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IN THE

Supreme Court of the United States,

OCTOBER TERM 1930.

No. 37.

INTERNATIONAL PAPER COMPANY,
Petitioner,

v.

THE UNITED STATES,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

BRIEF ON BEHALF OF PETITIONER.

JOHN W. DAVIS,
WILLIAM C. CANNON,
MONTGOMERY B. ANGELL,
PORTER R. CHANDLER,
Attorneys for Petitioner.

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BRIEF ON BEHALF OF PETITIONER.

Opinion Below.

The opinion of the Court of Claims is reported in 68 Ct. Cl. 414, and appears at R. 65-74.

Jurisdiction.

The Court of Claims announced its special findings of fact, dismissed the petition and entered judgment against the petitioner for the cost of printing the record on November 4, 1929 (R. 74). The petition for certiorari was filed January 23, 1930, and was granted on April 14, 1930. 281 U. S. 710.

The jurisdiction of this Court is invoked under Section 3(b) of the Act of February 13, 1925, c. 299, 43 Stat. 938 (U. S. Code, Title 28, S. 288).

Statement of Facts.

This is an action brought by the petitioner, a New York corporation, to recover just compensation for a taking by the United States for a public purpose of its property (certain water rights and water power) at Niagara Falls, New York. The facts are fully set forth in the findings of the Court of Claims at R. 47-65. That Court denied compensation as a matter of law upon the facts as found.

The petitioner is a manufacturer of wood-pulp, paper and paper products. One of its mills is located at Niagara Falls, New York, near the Niagara River, about a mile above the Falls (Finding I, R. 47). At the time this cause of action arose (1917-1918) the machinery used in the manufacturing operations at the Niagara Falls mill was operated by and adaptable only for the use of water power applied directly. The petitioner had in use at that time six waterwheels located in a wheel pit on its property some 175 feet below the surface of the ground. The water turning these waterwheels was drawn from the main power canal of the Niagara Falls Power Company at a point some 300 feet from where the power canal tapped the Niagara River. The sketch (R. 14-A) attached to the amended petition in the Court of Claims as Exhibit A shows the physical situation. The petitioner's right to draw off and use its water arose under a series of deeds and leases from the Niagara Falls Power Company dating back to 1896, which were duly recorded and were sufficient to pass an estate in realty under the law of New York (Finding II, R. 47, and Finding VIII, R. 53).

In the Fall of 1917 the Niagara Falls Power Company was diverting some 10,000 cubic feet per second of water from the Niagara River (Finding VII, R. 51-52). Of this amount 720 cubic feet per second went to the petitioner's mill under the deeds and leases above mentioned, and was directly applied to the machinery by the petitioner at that mill. The balance was used by the Niagara Falls Power Company to generate power in its own plant (Finding VIII, R. 54).

The Niagara Falls Power Company's right to divert and use water from the Niagara River arose from three sources:

(a) Private grants in fee of lands bordering on the Niagara River adjacent to and including the point of intake;

(b) Letters Patent from the State of New York granting to the Power Company certain lands under water and between high and low water mark in the bed of the Niagara River at and beyond the point of actual diversion of the waters;

(c) Special Acts of the Legislature of the State of New York specifically granting to the Power Company the right to take, use, store, sell and lease water from the Niagara River (Finding IV, R. 49).

Among its specified charter powers, the Power Company had the right to convey lands and to sell, lease and supply water from the Niagara River, or power to be developed therefrom, for manufacturing, electrical, or power purposes (Finding III, R. 48).

In the Fall of 1917 the Secretary of War undertook to investigate the power situation at Niagara Falls. This investigation was due largely to the attitude of the Canadian authorities in threatening to stop the exportation of power from the Canadian side (Finding IX, R. 55). During the course of this investigation the Secretary of War became fully advised of the operations of the petitioner's Niagara Falls mill and its water rights under its deeds and leases from the Power Company. Copies of these deeds and leases were requested by, and furnished to, the Secretary of War (Finding X, R. 55-58). On December 28, 1917, the Secretary of War, acting in the name of the President, "by reason of the exigencies of the national security and defense", issued a requisition order addressed to the Niagara Falls Power Company requisitioning "the total quantity and output of the electrical power which is capable of being produced and/or delivered by you through the use of all waters diverted or capable of being diverted through

your intake canal." It was expressly stated that fair and just compensation would be paid (Finding XI, R. 58).

This requisition order of necessity operated as a taking of the water belonging to the petitioner under its deeds and leases from the Power Company, and was intended so to operate. The petitioner's property did not touch the Niagara River at any point, and the intake canal of the Power Company was the only source from which the petitioner could obtain water for its Niagara Falls mill (Finding VIII, R. 54). Without question it was the express intention of the Government, in making the requisition order, to appropriate the petitioner's water, for on the day after the requisition order was made, the Secretary of War wrote the Power Company a letter which contained the following paragraph (Finding XII, R. 61):

> "Please note that the requisition order *covers also all of the water capable of being diverted* through your intake canal to such extent as it can be used on your machinery. *This is intended to cut off the water being taken by the International Paper Company and thereby increase your productive capacity.* Representatives of the International Paper Company were advised of this contemplated action some time ago and should by this time be prepared for the cut-off." (Italics ours.)

The notification to the Paper Company referred to in the above letter had in fact been given some two weeks earlier, on December 12, 1917 (Finding XIII, R. 62).

Along with the requisition order of December 28, 1917, but separate and distinct therefrom, the Government delivered to the Power Company a document styled a "temporary waiver" with an accompanying schedule, to which the Power Company agreed (Finding XI, R. 58-61). This waiver, after reciting the requisition, stated that the Power Company had requested to be permitted to continue to produce and sell power, and that the Secretary of War believed that the exigencies of the national security and defense would be adequately provided for if the electrical power

requisitioned by the Government should be sold by and for the account of the Power Company and distributed to the industries specified by the United States in the attached schedule. The United States then agreed that it would waive delivery of any and all power on the conditions stated, and the Power Company agreed in return that it would waive any right to compensation. The petitioner was not among the industries listed in the schedule to which electrical power was to be delivered, and was not a party to this agreement (Finding XI, R. 58-61).

At the time the requisition order was made, the petitioner owned at the Niagara Falls mill large stocks of unfinished paper and wood pulp, which had to be run out if needless waste was to be prevented. The Secretary of War accordingly permitted the petitioner to continue to use its water until this stock was run out. This was accomplished on February 7th, 1918. On that date the petitioner's water was shut off under the requisition order of December 28th, and as a result the petitioner was forced to shut down its mill (Finding XIII, R. 62). At that time, as pointed out in Finding VIII, R. 54, the petitioner's machinery could be operated only by water power derived from the sources which the Government had appropriated; and no other form of power (whether steam or electric) was available. The usefulness of the Niagara Falls mill as a going concern was dependent wholly upon its supply of water.

The shut-down of the mill lasted from February 7th, 1918 until November 30th, 1918, when the requisition order was abrogated (Finding XIII, R. 62). During all this time the requisition order of December 28th remained in effect unmodified; and the petitioner was unable to obtain any water. The schedule accompanying the so-called "waiver" at no time permitted the Power Company to deliver any water to the petitioner; and throughout the period the Power Company took and used all the water diverted from the Niagara River for the purposes dictated by the Government.

The Court of Claims specifically found that the petitioner had sustained an actual out-of-pocket or direct expense of $304,685.26, which would not have been sustained if the mill had been able to operate during the period of shut-down (Finding XXII, R. 64). No compensation has ever been paid to the petitioner by the United States or by anyone else (Finding XIV, R. 63).

In addition to the foregoing, the Court of Claims in its opinion lays emphasis on certain additional facts, which for that reason should here be mentioned, although it is difficult to see their relevance. In May, 1910, the United States and Great Britain entered into a Treaty (36 Stat., Part 2, p. 312), which limited the diversion of water from the Niagara River for power purposes on the American side to a daily diversion at the rate of 20,000 cubic feet per second (Finding VI, R. 51). The amount of water which the Power Company and other American users were diverting in 1917 and 1918 was well within this limitation. Under the so-called Burton Act (Act of June 29, 1906, c. 3621, 34 Stat. 626) and a series of joint resolutions extending its operation, the Secretary of War from time to time issued to the Power Company, a series of so-called permits or licenses covering the diversion of water from the Niagara River (Finding VII, R. 51-53). The license of January 19, 1917, extended by letter of July 2, 1917, gave the Power Company permission to divert a daily total of 10,000 cubic feet per second. This license expired by its terms on July 1, 1918; and on that date it was renewed by a similar license running until June 30, 1919, permitting diversion at the same rate. These licenses stated that they were revocable at will, but the Court of Claims expressly found that at no time was any of them ever modified or revoked (Finding VII, R. 53).

In its opinion the Court of Claims several times (*e. g.*, R. 68, 71, 73) mentions and gives controlling weight to the Federal Water Power Act of 1920 (Act of June 10, 1920, Ch. 285, 41 Stat. 1063, U. S. Code, Title 16, Secs. 791-823). This statute, it will be noted, was enacted some two years after the expropriation which gave rise to the present suit.

Specifications of Error.

The ultimate error assigned is that the Court of Claims erred in holding as a matter of law that the petitioner was not entitled to compensation for the taking of its property. The detailed specifications of error (all of which are intended to be urged here) are set forth in the petition for certiorari under the heading "Questions Presented" (R. 3).

Summary of Argument.

I. THE PETITIONER'S RIGHT TO THE USE OF ITS WATER WAS NOT A MERE CONTRACTUAL RIGHT *IN PERSONAM*, BUT AMOUNTED UNDER THE LAWS OF NEW YORK TO A PRESENT ESTATE IN THE NATURE OF A LEASEHOLD OF REALTY.

II. THE TAKING OF PETITIONER'S WATER RIGHTS WAS AN INTENTIONAL TAKING OF PRIVATE PROPERTY FOR A PUBLIC PURPOSE, FOR WHICH COMPENSATION MUST BE PAID UNDER THE FIFTH AMENDMENT. *DUCKETT & COMPANY* v. *UNITED STATES*, 266 U. S. 149.

III. THE POWER COMPANY'S WAIVER OF COMPENSATION CANNOT OPERATE TO DEPRIVE THE PETITIONER OF ITS RIGHT TO COMPENSATION IN RESPECT OF ITS OWN PROPERTY.

IV. THE TAKING WAS NOT ACCOMPANIED BY ANY REVOCATION OF THE FEDERAL LICENSE AND WAS NOT UNDER ANY CLAIM OF RIGHT.

V. NEITHER THE TREATY WITH GREAT BRITAIN NOR THE FEDERAL WATER POWER ACT HAS THE EFFECT OF TRANSFERRING TO THE FEDERAL GOVERNMENT PROPRIETARY RIGHTS IN THE WATERS OF THE NIAGARA RIVER ACQUIRED UNDER THE LAWS OF THE STATE OF NEW YORK.

VI. UPON THE FACTS AS FOUND, PETITIONER IS ENTITLED TO COMPENSATION IN THE AMOUNT OF $304,684.26, WITH INTEREST AT 6% FROM THE DATE OF THE TAKING.

ARGUMENT.

POINT I.

The petitioner's right to the use of its water was not a mere contractual right *in personam*, but amounted to a present estate in the nature of a leasehold of realty.

The character of petitioner's rights in the use of its water is determined by the laws of the State of New York, where the property in question is located.

> *Fox River Company* v. *Railroad Commission*, 274 U. S. 651, 655;
> *Port of Seattle* v. *Oregon & Washington Railroad*, 255 U. S. 56, 63;
> *United States* v. *Cress*, 243 U. S. 316, 319;
> *St. Anthony Falls Power Company* v. *St. Paul Water Commissioners*, 168 U. S. 349, 358;
> *Shively* v. *Bowlby*, 152 U. S. 1;
> *Kaukauna Company* v. *Green Bay Canal Company*, 142 U. S. 254, 272;
> *Hardin* v. *Jordan*, 140 U. S. 371, 382;
> *St. Louis* v. *Rutz*, 138 U. S. 226, 242.
> *Packer* v. *Bird*, 137 U. S. 661;
> *Barney* v. *Keokuk*, 94 U. S. 324;

In the *Fox River Company* case, Mr. Justice Stone said (274 U. S., at p. 655):

> "* * * the nature and extent of the rights of the state and of riparian owners in navigable waters within the state and to the soil beneath are matters of state law to be determined by the statutes and judicial decisions of the state."

In the present case, it is unnecessary to decide whether the mere fact of ownership of the uplands would or would not

have operated to give the Power Company title to the bed of the Niagara River, or the right to divert water. The Power Company's title to the bed of the river, and its right to divert water, were not dependent merely upon its ownership of the uplands or upon grants from private individuals. On the contrary, as is pointed out in Finding IV, R. 49, the Power Company held title to the bed of the stream under Letters Patent from the State of New York, and had been given specific authority by New York statute to take, use, store, sell and lease water from the Niagara River. Under the New York decisions, the water rights of the Power Company (whether derived from its ownership of the uplands or from specific grants by the State, or both) were vested property rights so far identified with realty as to constitute a corporeal hereditament.

United Paper Board Company v. *Iroquois Paper and Pulp Company,* 226 N. Y. 38;
Matter of Van Etten v. *City of New York,* 226 N. Y. 483, 486;
Waterford, etc., Company v. *State,* 208 App. Div. 273, affirmed without opinion 239 N. Y. 629;
Tracy Development Co. v. *Becker,* 212 N. Y. 488, 499;
Lawrence v. *Whitney,* 115 N. Y. 410;
Gould, *Treatise on Waters,* 3rd Ed. Ch. VI, p. 394.

In the *Van Etten* case, *supra,* the court said (226 N. Y. at p. 486):

> "The right of the owner of riparian land to the natural flow of water in a stream along the land is a corporeal hereditament and is an incident to and is annexed to the land as part and parcel of it. It is not, and is more than, an easement. The right is usufructuary. It is properly classified at common law, equally with the land itself, as real property."

Being hereditaments, water rights fall within the definitions contained in Section 2 of the New York Real Property

Law* (Laws of 1909, Ch. 52) and in Section 40 of the New York General Construction Law** (Laws of 1909, Ch. 27), and are properly classified, under those laws, as real property. *Tracy Development Company* v. *Becker*, 212 N. Y. 488, 499.

As already noted, by special grants of the New York Legislature, the Power Company in this case was given the express right to take, use, store, sell and lease water from the Niagara River. Ch. 109 of the Laws of 1889 (quoted *infra*, Appendix, p. 30); Ch. 513 of the Laws of 1892 (quoted *infra*, Appendix, p. 30); Ch. 477 of the Laws of 1893 (quoted *infra*, Appendix, p. 30). In view of both the common law of New York and these express legislative grants of the right to withdraw water, coupled with the legislative grant of title to the bed of the Niagara River, the Power Company's right to the use of the water was unquestionably an interest or estate in realty; and this has been the express holding in a similar case affirmed by the Court of Appeals of New York. *People ex rel. Niagara Falls Hydraulic Manufacturing Company* v. *Smith*, 175 N. Y. 469, affirming without opinion 70 App. Div. 543.

In that case it appeared that the relator owned certain property, consisting among other things of a canal and power plant, extending from a point on the Niagara River directly above the Falls to a point on the river below the Falls. This property embraced lands under the waters of the Niagara River near the mouth of the Company's canal, the canal proper (which was about 100 feet wide and a mile long), the canal basin near the edge of the high bank of the Niagara River below the Falls, land below the high bank of the Niagara River, and other property. In 1883 the State of New York acquired all lands between relator's canal and the brink of the Falls for a State park. In 1896 the Leg-

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* "The terms 'real property' and 'lands' as used in the first eight articles of this chapter are coextensive in meaning with lands, tenements and hereditaments." N. Y. Real Property Law, § 2.

** "The term real property includes real estate, lands, tenements and hereditaments, corporeal and incorporeal." N. Y. Gen. Const. Law, § 40.

islature passed a special act confirming and defining the riparian rights of the relator (N. Y. Laws of 1896, ch. 968). This act was substantially similar in wording and effect to the various special acts of the New York Legislature defining the powers and the riparian rights of the Power Company in the case at bar. In 1901 the State of New York, for tax purposes, undertook to assess as part of the relator's real property its right to take water from the Niagara River. The relator asserted that this right was a franchise and as such was not assessable as real property. The court held, however, that the relator's right to draw water from the river was not a franchise but a corporeal hereditament appurtenant to its land, and decreed that the value of that interest was properly included as realty in assessing the land for purposes of taxation.

We turn now to the nature of the petitioner's rights, as distinguished from the rights of the Power Company. The right of the petitioner to take and use water from the Power Company's intake canal originated in the deed of March 7, 1896 (Exhibit B to amended petition, R. 15; cf. Finding VIII, R. 53). By this deed, the Power Company conveyed to the Niagara Falls Paper Company (predecessor in title of the petitioner), and to its successors and assigns forever, certain described land and land under water in the City of Niagara Falls, which in 1918 constituted the site of the Niagara Falls Mill,

> "together with three thousand horse power, such as are hereinafter described, to be used as prescribed in the conditions and covenants hereinafter set forth, with all the privileges and appurtenances to the same belonging" (R. 16).

The grant of both the land and the water power was in perpetuity, subject, however, to certain reservations contained in the deed, including payment to the Power Company, its successors and assigns, of $24,000 per year

> "as an annual rental for the right to take, develop and use upon the premises hereby granted, water and water power sufficient to produce Three thousand (3,000) Horse Power as hereinafter defined" (R. 17).

The Power Company, for itself, its successors and assigns, gave the usual covenants that it was the lawful owner of the property in question and had a good right to convey, and

> "that said power hereby agreed to be taken and paid for shall be maintained as hereinafter provided, and that the party of the second part [the Paper Company], on paying the said yearly rental for power, and performing the covenants and conditions herein contained, shall and may quietly and peaceably have, hold and enjoy the said premises forever" (R. 18).

This deed fulfilled all the required formalities for a deed conveying realty under the laws of New York, and was duly recorded in the County Clerk's office of Niagara County.

On the same day as the execution of this deed (March 7, 1896) the Power Company entered into a lease with the Niagara Falls Paper Company (Exhibit C to amended petition, R. 29; cf. Finding VIII, R. 53), in which the execution of the deed was recited, and it was stated that the Paper Company desired to obtain additional power beside that to be developed under the terms of the deed,

> "and to pay for such right by way of rental for a term of years, and not as a condition of said conveyance" (R. 30).

The lease then gave to the Paper Company, its successors and assigns, for a term of years the right to take additional water from the Power Company's canal, for use at the Niagara Falls mill, in an amount sufficient to develop 2,900 horsepower, in addition to the 3,000 horsepower granted in perpetuity by the deed. This lease ran for a period of ten years from 1896, with the right in the Paper Company to renew for one or more additional terms of ten years until January 1, 1936. In addition, the Paper Company was given the right on ten days' written notice to take, use and discharge additional water sufficient to develop blocks of not less than 500 horsepower up to the full capacity of the discharge tunnel leading from the bottom of the Paper Company's wheelpit to the main tunnel of the

Power Company. The Paper Company agreed to pay $29,000 a year as an annual rental for the 2,900 horsepower, and a further rental at the rate of $10 per horsepower per annum for each additional block of 500 horsepower which it might elect to take. This lease fulfilled all the requirements for a lease of realty in New York and was duly recorded in the County Clerk's Office of Niagara County.*

The International Paper Company, petitioner in this case, by deed dated January 1, 1898 (Exhibit D to amended petition, R. 37, cf. Finding VIII, R. 53) acquired all the title of the Niagara Falls Paper Company to its land and water rights at the Niagara Falls mill, including its right to take water from the Power Company's intake canal under the deed and lease of March 7, 1896. By agreement dated June 1, 1898 (Exhibit E to amended petition, R. 43; cf. Finding VIII, R. 54) between the Power Company and the petitioner, the Power Company recognized and consented to the transfer to the petitioner of the land and water rights formerly owned by the Niagara Falls Paper Company and confirmed the grants, rights and agreements transferred to the petitioner, and agreed with the petitioner to fulfill and carry out the deed and lease as if they had been originally made between the petitioner and the Power Company. The petitioner in turn assumed all the obligations contained in the deed and lease.

The Paper Company from time to time duly exercised the option contained in the lease, and took and used additional blocks of water. In January 1918, it was taking and using from the Power Company's canal an amount of water sufficient to develop 8,156.25 horsepower, which was equivalent to 720 cubic feet per second (Finding VIII, R. 54). This represented a substantial part of the total of 10,000 cubic feet per second which the Power Company was then taking from the Niagara River.

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* The recording statute of New York (Real Property Law, Sections 290 and 291) provides that a lease of real property for a term exceeding three years may be recorded in the same manner, and with the same effect, as a conveyance of the fee.

Under these various conveyances, the right of the petitioner to the water from the Power Company's canal was not a mere contractual right *in personam* against the Power Company, but was an estate in realty.

It is unquestionable that the right of the Power Company to divert and use the water of the Niagara River was real property under the laws of New York, as shown by the cases already cited. It is equally unquestionable that the Power Company had a right to convey or lease a part of its water rights to another party, whether or not the grantee was a riparian owner, for the Court of Appeals of New York has expressly declared that the right to use the water of a flowing stream is

> "* * * a valuable property right which can be severed from the riparian land by grant, condemnation, relinquishment or prescription." *United Paper Board Company* v. *Iroquois Paper and Pulp Company*, 226 N. Y. 38, 46.

Under the law of New York, the purchaser or lessee in such a case becomes the owner of an estate in realty.

> *United Paper Board Company* v. *Iroquois Paper and Pulp Company, supra;*
>
> *Tracy Development Company* v. *Becker*, 212 N. Y. 488, 499;
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> *Morehouse* v. *Woodruff*, 218 N. Y. 494, 501;
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> *Saratoga State Waters Corporation* v. *Pratt*, 227 N. Y. 429, 444;
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> *Onondaga Water Service Corporation* v. *Crown Mills*, 132 Misc. 848, 853; 230 N. Y. Supp. 691, 697;
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>
> *Matter of Hall*, 116 App. Div. 729, affd. 189 N. Y. 552;
>
> Gould, *Treatise on Waters*, 3rd Ed. ch. X, p. 581.

In *Tracy Development Company* v. *Becker, supra,* the Court of Appeals said (212 N. Y. at p. 499):

> "* * * Water is not land. It is an incident to land which gives to the owner of the land certain rights and privileges in the use of the water. If it flows over his own land it is so far identified with the realty as to be a corporeal hereditament; and if the right is to use it as it flows over the lands of another it is an incorporeal hereditament. In either event the right of property in the water is usufructuary. It is not an ownership in the fluid as such, but the right to its flow for the various lawful uses to which it may be subjected. Since such an hereditament is incident to land, it naturally passes with land, and, therefore, it is properly classified as real property in the 'Real Property Law,' in the 'Statutory Construction Law' and in the 'Tax Law.'"

Moreover, in the present case it must be remembered that the Power Company, by express legislative grant, possessed not merely the right to take and use the waters of the Niagara River for its own benefit, but also the right to "sell and lease" them to other parties. Having an estate in realty in the use of the flowing water, the Power Company carved out and conveyed to the petitioner a smaller estate, which was none the less an estate in realty and not a mere contractual right. The petitioner, as lessee of the water rights involved, enjoyed something more than a mere contractual right *in personam* against the Power Company. At the time of the Government's requisition it possessed and enjoyed a vested property right in the flowage of the water through its mill.

POINT II.

The taking of petitioner's water rights was an intentional taking of private property for a public purpose, for which compensation must be paid under the Fifth Amendment.

The water rights of the petitioner were undoubtedly taken, and intentionally taken for a public purpose, during the ten months' period in which the Government's requisition order of December 28, 1917 (R. 58) remained in effect. These water rights were of such a character that they constituted private property within the meaning of the Fifth Amendment, for which, if taken, compensation must be paid.

> *Pumpelly* v. *Green Bay Company*, 13 Wall. 166;
> *United States* v. *Lynah*, 188 U. S. 445;
> *United States* v. *Welch*, 217 U. S. 333;
> *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312;
> *United States* v. *Alexander*, 148 U. S. 186;
> *United States* v. *Great Falls Mfg. Co.*, 112 U. S. 645;
> *James* v. *Campbell*, 104 U. S. 356;
> *Central Trust Co.* v. *Hennen*, 90 Fed. 593;
> *Williams* v. *United States*, 104 Fed. 50;
> *Lowndes* v. *United States*, 105 Fed. 838.

By the requisition order of December 28th, 1917, the President, "by reason of the exigencies of the national security and defense", took over and requisitioned

> "The total quantity and output of the electrical power which is capable of being produced and/or delivered by you through the use of all waters diverted or capable of being diverted through your intake canal."

While this order was on its face addressed to the Power Company and not to the petitioner, it of necessity amounted

to a taking of the petitioner's water, as well as that of the Power Company. The *res* which was taken was "the use of all waters diverted or capable of being diverted" through the Power Company's intake canal. All of the petitioner's water came from this source. The Court of Claims found (Finding VIII, R. 54) that there was no other source from which the petitioner could obtain water to run its mill. This water it was then taking by virtue of its deeds and leases from the Power Company.

It is true that the requisition in terms was not for the water as such, but for "the total quantity and output of the electrical power" capable of being produced by the use of the water. But the electrical power could be produced only by the use of the water; one was the alter ego of the other. In fact the electrical energy generated by the dynamos was merely another manifestation of the power inherent in the flowing water. They constituted one and the same thing. Recognizing this, the requisition order described the power which was taken as all power which could be produced "through the use of all waters diverted or capable of being diverted" through the canal; and the Secretary of War's letter (R. 61), which followed the service of the requisition order by only twenty-four hours, specifically stated that "the requisition order covers also all of the *water*" capable of being so diverted. Clearly the essence of the taking was a taking of the water, including that portion which had been leased by the Power Company to the petitioner.

Moreover, there is no doubt that the Government itself intended that the requisition order should operate as an expropriation of the petitioner's water. Before the requisition order was made, the Secretary of War (acting through his representative, Mr. Bulkley) had specifically inquired as to the extent of the petitioner's rights in the water, and had been furnished with copies of the deeds and leases forming the muniments of petitioner's title (Finding X, R. 55-58). The day after the requisition order, the Secretary of War wrote to the Power Company specifically stating that the order

"is intended to cut off the water being taken by the International Paper Company and thereby increase your productive capacity."

This case, we submit, is governed by the decision of this Court in *Duckett & Company* v. *United States*, 266 U. S. 149. There the Secretary of War, by formal requisition (addressed "To Whom it May Concern") took over the Bush Terminal in Brooklyn. The plaintiff was the lessee of one of the piers included in the Terminal. This Court, reversing the Court of Claims, awarded compensation to the plaintiff for the taking of his leasehold, saying at page 150:

"On the face of those acts it seems to us manifest that the United States, although not taking the fee, proceeded *in rem* as in eminent domain, and assumed to itself by paramount authority and power the possession and control of the piers named, against all the world. Ordinarily an unqualified taking in fee by eminent domain takes all interests and as it takes the *res* is not called upon to specify the interests that happen to exist. Whether or not for some purposes the new takers may be given the benefit of privity with the former holders, the accurate view would seem to be that such an exercise of eminent domain founds a new title and extinguishes all previous rights. *Emery* v. *Boston Terminal Co.*, 178 Mass. 172, 184. *Farnsworth* v. *Boston*, 126 Mass. 1, 8. In such a case we no more should expect to hear it argued that leaseholds were not to be paid for than that the former fee simple should not be, on the ground that it was gone and a new fee begun. A right may be taken by simple destruction for public use. *United States* v. *Welch*, 217 U. S. 333, 339. See *Peabody* v. *United States*, 231 U. S. 530, 538. Here the taking purported to be a taking of the Bush Terminal docks, &c.—not of the title of the Bush Terminal Company, but of the things, to whomsoever they belonged. The notice was 'to whom it may concern.' The claimant was turned out like the others. We can see no ground for attributing to the United States the extraordinary intent to recognize and pay for other interests but to exclude the claimant."

So in this case, the taking was a taking of all the water capable of being diverted through the Power Company's canal. The petitioner, lessee of part of this water, "was turned out like the others".

In the instant case, however, the Court of Claims refused to apply the *Duckett* case, and held instead that the case was governed by *Omnia Commercial Company* v. *United States*, 261 U. S. 502. In this, we submit, the Court of Claims was in error.

In the *Omnia Commercial Company* case, the plaintiff had made an executory contract with the Allegheny Steel Company for the delivery of steel. Before any deliveries had been made, the United States requisitioned the Allegheny Steel Company's entire production, thus preventing delivery to the plaintiff. This Court held that the plaintiff was without recourse against the United States, since it had merely a contractual right against the Steel Company and its contract had not been taken, but had merely been frustrated.

In the case at bar, as pointed out above, the petitioner's right to the water was not a mere contractual right similar to that possessed by the Omnia Commercial Company. It was a right *in rem*, amounting under the laws of New York to an estate in realty, precisely like the leasehold interest of Duckett & Company. If the petitioner's right had been in the nature merely of a personal executory contract calling for the delivery of electrical power, there might have been some ground for applying the *Omnia* case. But the petitioner had more than a personal executory contract. Under its deeds and leases, it had a vested estate in realty in its right to the use of its water. Upon a part of that water, it held a perpetual leasehold, and upon the balance it held a lease for a term of years, subject in each case to the payment of an annual rent. The grant in each case was not personal to the original grantee, but ran in favor of the grantee, its successors and assigns; and the right to use the water, under the terms of the deed of 1896, was appurtenant to the premises granted by that deed. At the time of the taking, the peti-

tioner was in full possession and enjoyment of its estate. As in the *Duckett* case, "the claimant's possession under its lease was a part of the *res*, and therefore was within the implied promise to pay". The Government's requisition order, during the time it was in effect, took both the leasehold and the fee of the water to the same extent and effect as the requisition order in the *Duckett* case. Under the ruling in the *Duckett* case the petitioner is entitled to compensation for what was taken.

In a recent case in the Court of Appeals of the District of Columbia the Court fully recognized this principle when it said, speaking of the right to just compensation under the Fifth Amendment:

> "The interest of the lessee is as much entitled to protection as that of the lessor." *Wrenn* v. *Smith*, 41 F. (2nd) 972, 973.

POINT III.

The Power Company's waiver of compensation cannot operate to deprive the petitioner of its right to compensation in respect of its own property.

The fact that the requisition order of December 28, 1917, was addressed to the Power Company and not to the petitioner cannot of course affect the ultimate result. At the time this requisition order was made and served, the United States knew that the Power Company did not itself own or have the right to use all the water which it was diverting. It was fully advised as to the rights of the Paper Company, and in writing expressed its intention to take those rights. The order was an unconditional requisition. It was a command and not an offer; and neither the Power Company nor the petitioner had any option save to obey. *Liggett & Myers* v. *United States*, 274 U. S. 215, 220.

The so-called "waiver" (R. 58-61) accompanying the requisition was a separate and distinct document. By this the Power Company (not the Paper Company) waived the compensation to which the requisition entitled it, on condition that it be allowed to continue to supply electrical power to certain designated industries, and collect its schedule rates. Through this device the Power Company obtained the equivalent of compensation for the taking.

But there was no identity of interest between the Power Company and the petitioner. The petitioner was not a party to the waiver, did not consent to it, and was not upon the list of companies named in the schedule, to which the Power Company was permitted by the Government to deliver power. The petitioner's rights in the water were enjoyed adversely to the Power Company. The Power Company was not entitled to speak or act for the petitioner, and was certainly not authorized to waive petitioner's rights. A consent by the lessor to waive compensation for the taking of the fee cannot operate to deprive the lessee of the right to compensation for the taking of the leasehold. As was said in the *Duckett* case (266 U. S. at p. 151):

> "Any arrangement that the Government may have made later with the owner to pay to it what might be due to the tenants or some of them did not affect the claimant's rights."

Under these circumstances it is a little difficult to understand what the Court of Claims meant when it said (R. 72):

> "The Government did not take the property of the Niagara Falls Power Company without its consent, but, on the contrary, with its consent, and if there was no taking as to the Niagara Falls Power Company, it is very plain that there would be none as far as the plaintiff is concerned."

At no time did the petitioner waive its rights or consent to any taking, whether of its property or of that of the Power Company. Petitioner's water power was taken by the Gov-

ernment "by reason of the exigencies of the national security and defense". The Power Company's waiver recited that "in the judgment of the Secretary of War such exigencies will be provided for adequately for the time being" by supplying electricity to be developed from the seized water power to certain industries named in the schedule. These industries were regarded as essential war industries, while the petitioner's business was not. (Findings VIII and IX, R. 54-55; cf. R. 69, 73-4.) The requisition order was in the name of the President; and the taking was for a public use, in aid of the prosecution of the war. The waiver of just compensation by the Power Company on the conditions specified did not change the nature of the requisition order of December 28, 1917. Certainly it did not change the nature of that order so far as the petitioner was concerned. Nor did it affect the obligation of the United States to pay just compensation for the taking. The requisition order stood, with all its legal consequences. By agreement with the Government, the Power Company waived its own undoubted claim for just compensation (a claim expressly recognized in the requisition order) and acquired in lieu thereof the right to continue to produce and sell power to such industries and in such amounts as the United States directed in the schedule accompanying the waiver. In this way the United States parceled out the power which it had taken by sovereign right among certain industries which it deemed essential for the successful prosecution of the war. Upon the taking of the water, the United States controlled the use and directed it for war purposes. But the petitioner was not a party to the waiver and received no compensation for the taking of *its* property, notwithstanding that the Court of Claims expressly found that the petitioner *"was entitled"* to its water under the deeds and leases already mentioned, and *"was deprived"* of that water *"by the United States"*. (Finding XIV, R. 63). Under these circumstances, a promise to pay the petitioner will be implied in law; and any waiver which the Government may have obtained from the Power Company cannot prejudice the petitioner's rights.

POINT IV.

The taking was not accompanied by any revocation of the Federal license and was not under any claim of right.

The Court of Claims specifically found that the Federal licenses authorizing the Power Company to divert water from the Niagara River remained in effect during the period of the taking and were never revoked (Finding VII, R. 53). In fact, one of those licenses terminated on July 1, 1918, precisely in the middle of the period during which the requisition order remained operative, and a new license was immediately issued the same day, running until July 30, 1919 (Finding VII, R. 52). The requisition order makes no reference to the licenses, but on the contrary in terms undertakes to pay "fair and just compensation". This express promise certainly negatives any argument that the taking was under any claim of right.

Nevertheless, in the Government's brief in opposition to our petition for certiorari, it is argued that the "substantial effect" of the requisition order was equivalent to a revocation of the Power Company's license. If the Government's present contention be sound, then both the petitioner and the Power Company were mere tenants at sufferance, and were liable to be evicted by the Federal authorities without compensation at a moment's notice, although they enjoyed vested property rights conferred upon them by the State of New York. If the whole proceeding amounted merely to such an eviction (as the Government now claims), why were the licenses not mentioned in the requisition order, and why did the Court of Claims expressly find that the licenses were never revoked or modified? If neither the Power Company nor the petitioner was entitled to compensation, why did the requisition order expressly undertake to pay compensa-

tion? If the making of the requisition order on December 28, 1917, amounted to a revocation of the license then in force, why did the Secretary of War renew that license as a matter of course when it expired six months later on July 1, 1918? Even if it be conceded that the rights of the Power Company or the petitioner were in any way dependent upon the existence of a Federal license, which we respectfully deny, the record is clear that in taking the property the Government did not proceed as by revocation of the license. This is certainly true with regard to the Power Company, both by reason of the fact that the licenses continued in effect throughout the period of the taking, and were in fact renewed during that period, and also by reason of the fact that the requisition order promised to pay compensation. This promise, when made with knowledge of the lessee's rights, and with the intention of depriving the lessee of those rights (as was the fact here), implies a promise to pay compensation to the lessee also.

POINT V.

Neither the treaty with Great Britain nor the Federal Water Power Act has the effect of transferring to the Federal Government proprietary rights in the waters of the Niagara River acquired under the laws of the State of New York.

The United States has no proprietary rights in the bed of the Niagara River or in its waters. Title both to the bed and to those waters is in the State of New York, or in private individuals deriving their title from the laws of New York, subject only to the paramount right of the United States to control the bed and the waters for purposes of navigation.

Appleby v. *City of New York*, 271 U. S. 364;
Massachusetts v. *New York*, 271 U. S. 65, 89;
International Bridge Co. v. *New York*, 254 U. S. 126;
Goodtitle v. *Kibbe*, 9 How. 471;
Pollard's Lessee v. *Hagan*, 3 How. 212;
Martin v. *Waddell*, 16 Peters 367.

In the case at bar no question of navigation or navigability is involved. Between the point of intake of the water above the Falls and its discharge below the Falls, the Niagara River is wholly unnavigable on account of the intervening rapids and falls, and the temporary use of the water for power purposes did not diminish the flow in the river below, for all the water taken was returned through the tail-race tunnel. Thus there is no opportunity for invoking the doctrine of paramount control over navigation, and we do not understand that the Government attempts to invoke that doctrine.

The Treaty of 1910 with Great Britain (36 Stat. part 2, p. 312) imposed a limitation upon the aggregate amount of water which the nationals of each country might draw from the Niagara River. On the American side the withdrawal was limited to a daily diversion at the rate of 20,000 cubic feet per second. The amount of water which the Power Company and other American users were diverting in 1917 and 1918 was well within this limitation. Both the Power Company and the Paper Company had been taking and using water from the Niagara River long before the adoption of the treaty. Article VIII of the Treaty of 1910 provided (36 Stat. part 2, p. 316):

> "The foregoing provisions shall not apply to or disturb any existing uses of boundary waters on either side of the boundary."

By virtue of the Treaty of 1910, the Court of Claims asserted that the United States has "assumed control" over the waters of the Niagara River for power purposes, and as a result held that the Government may take without compensation, for any purposes which it deems fit, any and all water

rights owned by citizens of the State of New York, whether vested or otherwise. This is tantamount to holding that under its treaty-making powers the Federal Government may acquire and exercise, without compensation to the owner, a proprietary right in the waters of a boundary stream, an astonishing and novel doctrine.

It may be that under the treaty-making power, or in fact under its power over navigation, the Federal Government may impose a limit on diversion, beyond which the private owner cannot go. But this falls far short of the principle announced by the Court of Claims. To limit the use of private property in the interests of navigation is one thing. It is quite another thing to deprive a private owner of his rights to use within the limits fixed (navigation being in no way involved), or to construe such a limitation as a transfer to the Federal Government of vested property rights recognized by local law. As this Court said in *United States* v. *River Rouge Co.*, 269 U. S. 411, 419:

> "The right of the United States in the navigable waters within the several States is, however, 'limited to the control thereof for the purposes of navigation'. *Port of Seattle* v. *Oregon Railroad*, 255 U. S. 56, 63. And while Congress, in the exercise of this power, may adopt, in its judgment, any means having some positive relation to the control of navigation and not otherwise inconsistent with the Constitution, *United States* v. *Chandler-Dunbar Co., supra*, 62, it may not arbitrarily destroy or impair the rights of riparian owners by legislation which has no real or substantial relation to the control of navigation or appropriateness to that end."

Or, as was said in *United States* v. *Cress*, 243 U. S. 316, 319:

> "The States have authority to establish for themselves such rules of property as they may deem expedient with respect to the streams of water within their borders both navigable and non-navigable, and the ownership of the lands forming their beds and banks (*Barney* v. *Keokuk*, 94 U. S. 324, 338; *Packer* v. *Bird*, 137 U. S. 661, 671; *Hardin* v. *Jordan*, 140 U. S. 371, 382; *Shively* v. *Bowlby*, 152 U. S. 1, 40, 58; *St. Anthony Falls Water Power Co.*

> v. *St. Paul Water Commissioners*, 168 U. S. 349, 358), subject, however, in the case of navigable streams, to the paramount authority of Congress to control the navigation so far as may be necessary for the regulation of commerce among the States and with foreign nations (*Shirely* v. *Bowlby*, 152 U. S. 1, 40; *Gibson* v. *United States*, 166 U. S. 269, 272; *Scott* v. *Lattig*, 227 U. S. 229, 243); the exercise of this authority being subject, in its turn, to the inhibition of the Fifth Amendment against the taking of private property for public use without just compensation (*Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 336; *United States* v. *Lynah*, 188 U. S. 445, 465, 471)."

See also *Wisconsin* v. *Illinois*, 278 U. S. 367, 415.

The Court of Claims, in addition to considering the Treaty of 1910, discussed in some detail the extent of Federal powers in relation to navigation, and in this connection gave what it termed "controlling effect" (R. 73) to the Federal Water Power Act of 1920 (Act of June 10, 1920, c. 285, 41 Stat. 1063; U. S. Code, Title 16, Sec. 791-823). It is hard to see what bearing this Act has upon the case. It was passed some two years after the taking in question. There seems to be no possible reason for invoking its provisions. In respect of this Act the Court of Claims said (R. 68):

> "The right embodied in and exercised by this statute was based upon the authority of Congress to preserve the navigability of waters of the United States, including those open to foreign commerce. The Constitutional power of Congress to exercise this right was fully discussed and considered by Congress during and prior to the passage of the Act. In view of this conclusion of Congress *as to its constitutional right to control water for power*, this Court will not undertake to say that it has not the power therein asserted and exercised." (Italics ours.)

It is not entirely clear what the Court means by this passage. There is no pretense that navigation was involved, directly or indirectly, in the taking here in question. The taking was a taking wholly and indisputably for war pur-

poses. As the requisition order stated, it was "by reason of the exigencies of the national security and defense," and had no relation whatsoever to the navigation or navigability of the Niagara River or to the regulation of interstate or foreign commerce. This Court only recently, in *Henry Ford and Son, Inc.* v. *Little Falls Fibre Co.*, 280 U. S. 369, had before it the Federal Water Power Act. In the course of that opinion, it was carefully pointed out that the Act does not purport to authorize the impairment, without compensation, of private property rights recognized by state law. After quoting the provisions of Section 27 and other sections of the Act, the Court said (280 U. S. at p. 378):

> "While these sections are consistent with the recognition that state laws affecting the distribution or use of water in navigable waters and the rights derived from those laws may be subordinate to the power of the national government to regulate commerce upon them, they nevertheless so restrict the operation of the entire act that the powers conferred by it on the Commission do not extend to the impairment of the operation of those laws or to the extinguishment of rights acquired under them without remuneration."

POINT VI.

Amount of Compensation.

The Court of Claims found that by reason of the shutdown of the Niagara Falls mill, occasioned by the taking of the water supply by the Government, the petitioner sustained "an actual out-of-pocket or direct overhead expense of $304,684.26" (Finding XXII, R. 64). To this amount petitioner is entitled under the decisions of this Court to add interest at 6% (the legal rate in New York) from the date of the taking.

Phelps v. *United States*, 274 U. S. 341;
Liggett and Myers v. *United States*, 274 U. S. 215;
Seaboard Air Line Ry. v. *United States*, 261 U. S. 299;
Brooks-Scanlon Corporation v. *United States*, 265 U. S. 106, 123.

CONCLUSION.

It is therefore respectfully submitted that the judgment of the Court of Claims should be reversed, and the cause remanded with directions to award proper compensation to the petitioner, in accordance with the findings of the Court of Claims.

Respectfully submitted,

JOHN W. DAVIS,
WILLIAM C. CANNON,
MONTGOMERY B. ANGELL,
PORTER R. CHANDLER,
Attorneys for Petitioner.

APPENDIX.

The pertinent provisions of New York Statutes with respect to the water rights of the Niagara Falls Power Company are as follows:

Chapter 109 of the Laws of 1889, Sec. 2, provided:

> "Said corporation [predecessor of Niagara Falls Power Company] shall also have power to hold, lease and convey lands or other property for the purposes of its business, and either upon such lands or elsewhere to accumulate, conduct, store, sell, lease, furnish, operate and supply the waters of the Niagara river, * * * or the power to be developed from the flow of such water for fire, sanitary, municipal, domestic, manufacturing, agricultural, electrical or power purposes * * *."

Chapter 513 of the Laws of 1892, Sec. 2, provided:

> "Said corporation [predecessor of Niagara Falls Power Company], its successors and assigns, shall have the right to take and use the waters of the Niagara river at the points heretofore authorized, and at any points on or opposite to any riparian land now owned by said corporation, * * * this right being granted upon the express condition that its acceptance shall bind said corporation to furnish free of charge electricity for light and also for power, * * * and also water for use of the state in the state reservation at Niagara and the public buildings thereon * * * provided that nothing contained herein or in any of the former acts concerning said corporation shall be so construed as to confer an exclusive right nor any right to infringe upon the state reservation, or to obstruct the navigation of the Niagara River, or to take therefrom more water than shall be sufficient to produce two hundred thousand effective horsepower."

Chapter 477 of the Laws of 1893, Sec. 2, provided:

> "The Niagara Falls Power Company, its successors and assigns, is hereby authorized and empowered * * *

to conduct, convey and furnish the waters of the Niagara river, but not in excess of the amount heretofore expressly authorized by law, or any power, heat or light developed therefrom, to, in and through any civil division of this State and to sell, furnish and deliver the same to any and all bodies or persons, public or private, wherever situate."